United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1917
74-1946

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

ANTHONY POLITI, GERALD POLITI, PHILIP POLITI, MICHAEL ROMAN, ROBERT PETERS, MICHAEL CAMPOREALE, ALPHONSE CUZZO, ARTHUR FRANGELLO, LEONARD HARRISON, LAWRENCE JOHNSON, LOUIS VISCONTI, EDDIE WASHINGTON, and HARRY WEIS,

Appellants.

On Appeal from the United States District Court for the Southern District of New York.

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

ARGUMENT

POINT I

DUE PROCESS OF LAW REQUIRES THE REVERSAL OF THE CONSPIRACY CONVICTIONS

Since the filing of our main brief, the following authorities have come to our attention and, we believe, should be presented to the Court.

For over a century our courts have applied Wharton's Rule in holding that where a substantive crime included as one of its elements a conspiracy to commit that

crime, an additional conviction for conspiracy was unacceptable. Wharton's Rule, in its simplest form, states:

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained." *

Wharton's Rule was adopted by this Court in the landmark case of United States v. Zeuli, 137 F.2d 845, 846 (2d Cir. 1943), where Judge Learned Hand wrote:

> "If a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it." **

The Supreme Court approved this rule of law in Gebardi v. United States, 287 U.S. 112, 122 (1932), where it held:

> ". . . where it is impossible under any circumstances to commit the substantive offense without cooperative

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* 2 Wharton, Criminal Law, §1604, at 1862 (12th Ed. 1932).

** See United States v. Central Veal & Beef Company, 162 F.2d 766 (2d Cir. 1947); United States v. DIRI, 159 F.2d 818 (2d Cir. 1947); United States v. Bayer, 156 F.2d 964 (2d Cir. 1946); United States v. Sager, 49 F.2d 725 (2d Cir. 1931); United States v. Hagan, 27 F.Supp. 814 (W.D. Ky. 1939); United States v. New York Central & H.R.R. Company, 146 F. 298 (Cir. Ct., S.D.N.Y., 1906).

> action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law . . . or under the federal statutes."*

More particulary, the Seventh Circuit, in United States v. Hunter, 478 F.2d 1019 (7th Cir. 1973), disallowed a conspiracy conviction where it accompanied a §1955 federal gambling conviction. The court wrote:

> "In the case before us, both alleged offenses required 'the mutual cooperation' or the 'reciprocal action' of a plurality of persons. The conspiracy charged . . . is confined to the transactions described . . . as a violation of §1955 . . . [and] covers nothing more than the substantive crime . . . . we find 'no ingredient in the conspiracy . . . which is not present in the completed crime . . . ."**

In light of the reversal of this Court's decision in United States v. Becker, 461 F.2d 230 (2d Cir. 1972), by the United States Supreme Court, *** the slate has

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* See United States v. Katz, 271 U.S. 354 (1926); United States v. Holte, 236 U.S. 140 (1915).

** See United States v. Whitaker, 372 F.Supp. 154 (M.D. Pa., 1974); United States v. Greenberg, 334 F.Supp. 1092 (N.D.O., 1971).

*** U.S. , 94 S.Ct. 2597 (May 28, 1974).

been wiped clean for a fresh analysis of this issue. We urge the Court to reassert the superior rationale of the Zeuli case. * The disfavor expressed by the Supreme Court for attempts "to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions", should sway this Court to strike down the superfluous conspiracy count in the present indictment. Grunewald v. United States, 353 U.S. 391, 404 (1957). See Krulewitch v. United States, 336 U.S. 440 (1949).

The prejudice generated by the prosecution's ill-advised addition of the conspiracy charge is very real. In addition to added punishment via fines and imprisonment,** the conspiracy addendum opens the floodgates

* See Note, 30 Wash. & Lee L. Rev. 613, 621 (1973); Note, 59 Iowa L. Rev. 452, 463 (1973).

** In setting the punishment for a §1955 conviction, which includes a conspiracy, congress certainly did not intend that the sentence be augmented by an additional sentence for a separate but inappropriate conspiracy conviction. In Ladner v. United States, 358 U.S. 169, 178 (1958), the Court wrote:

> "This policy of lenity means that the court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."

(See also Bell v. United States, 349 U.S. 81 [1955].)

for hearsay evidence at trial. The government extensively uses electronically gathered statements by various participants in the alleged gambling operation. A defendant charged with conspiring to violate §1955 has virtually no defense to the overwhelming hearsay evidence received ostensibly against one of the other defendants.*

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* See Developments in the Law - Criminal Conspiracy, 72 Harv. L. Rev. 920, 923 (1959), where one legal commentator has addressed himself to this very problem:

> "By means of evidence inadmissable under usual rules the prosecutor can implicate the defendant not only in the conspiracy itself but also in the substantive crimes of his alleged co-conspirators. In a large conspiracy trial the effect produced upon the jury by the introduction of evidence against some defendants may result in conviction for all of them, so that the fate of each may depend not on the merits of his own case but rather on his success in disassociating himself from his co-defendants in the minds of the jury."

See also United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940), aff'd 311 U.S. 205 (1940); Note, The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276, 277 (1948).

As a practical matter, the jury does not distinguish between the separate defendants' cases when conspiracy has been charged. The indiscriminating jury deliberations in cases like these are the real motivation for the adding of a separate conspiracy charge to a substantive crime which includes conspiracy as one of its elements. This Court is thus given another opportunity to express its displeasure and disagreement with this ever-mushrooming prosecutorial practice. Prosecutors must be told once and for all that our system of criminal justice does not tolerate such underhanded tactics.

For these various reasons, the judgments of convictions should be reversed and the indictments dismissed, or in the alternative, a new trial should be granted.

POINT II

THE GOVERNMENT HAS FAILED TO DISTINGUISH UNITED STATES v. MALLAH F.2d [2 Cir, 9/23/74] WHICH APPELLANTS MAINTAIN FORTIFIES THEIR POSITION THAT THE PROSECUTION WAS BARRED UNDER THE DOCTRINE OF DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL.

The government's answering brief strives vainly to distinguish the recent pronouncement of this Court in United States v. Mallah, F.2d [decided 9/23/74, slip 5475].

In Mallah, this Court reversed the conspiracy conviction of Vincent Pacelli, Jr., on the grounds that it constituted double jeopardy. Indeed, the case at bar is an a fortiori proposition since it is even stronger than Mallah.

Here there were several defendants common to both indictments and the conspiracies alleged therein. A significant quantity of runner codes and the items seized from the Bobbin Inn are identical in both cases. Geographically, the incidents in both indictments are close--certainly no more distant than in Mallah.

We see no purpose in reiterating the facts and arguments made in the main brief for appellants, but it is significant that the language of the charges in

both indictments are very similar. The time period of the earlier trial was predicated upon an indictment alleging a time spread wholly encompassed by the indictment in the case at bar.

In Mallah, this Court noted that prosecutors all too often use the vehicle of conspiracy to seek methods to prosecute alleged wrongdoers who manage to convince jurors of their innocence, even if they fail to sway the prosecutors.

Thus at 5498-5499 of the slip opinion in Mallah this Court aptly noted:

> "But because there are no doubt many overt acts which the government might have charged, a test measuring only overt acts provides no protection against carving one larger conspiracy into smaller separate agreements. In part of this reason, courts have been wary of applying a strict same evidence test in the context of criminal conspiracy. In Short v. United States, 91 F.2d 614, 624 (4th Cir. 1937), the court rejected reliance on the overt acts alleged, stating:
>
> > 'Blanket charges of "continuing" conspiracy with named defendants and with "other persons to the grand jurors unknown" fulfill a useful purpose in the prosecution of crime, but they must not be used in such a way as to contravene

> constitutional guaranties. If the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first.... The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading.'
>
> See also, United States v. Cohen, 197 F. 2d 26 (3d Cir. 1952); Arnold v. United States, 336 F.2d 347 (9th Cir. 1964), cert. denied, 380 U.S. 982 (1965); United States v. Palermo, 410 F.2d 468 (7th Cir. 1969).
>
> Here, the alleged two conspiracies occurred in the same general location at the same general time."

The prosecution, as stated in Mallah, has resort to charging substantive crimes without strained, "Pickwickian", manipulations of the conspiracy theory. The

government obviously was aware of the existence of the charges in this indictment when they prosecuted the former on which an acquittal was declared. They could have included additional counts in that true bill so as to encompass all known crimes at that time, rather than later indict because of an acquittal. Thus in Mallah at slip 5502, this Court ruled:

> "If more than one narcotics conspiracy is known to exist, charges may be brought in separate counts. If separate conspiracies become known at different times and are prosecuted separately, prosecutors should be prepared to demonstrate from the proof at the two trials that the criminal agreements are indeed separate and distinct.
>
> "In any case, separate indictments on substantive counts are always available, without double jeopardy problems.
>
> "In holding that the United States has not established that the conspiracy proved in Pacelli I and the conspiracy proved below are not one and the same, we would recall Justice Jackson's warning in Krulewitch v. United States, 336 U.S. 440, 445-46 (1949):
>
> > 'This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history

> exemplifies the "tendency of a principle to expand itself to the limit of its logic." The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.'
>
> But given the broad definition of narcotics conspiracy adopted in our cases, and recognizing that the task of defining the scope of these conspiracies is somewhat akin to describing an elephant from touch, we conclude that appellant has been convicted twice for the same offense."

We submit that in the case at bar, the Government did not demonstrate that the criminal agreements were separate and distinct in each trial. On the contrary, since several key personnel are identical in both, the agreements were clearly the same.

CONCLUSION

The judgments of conviction should be reversed and the indictment dismissed, or alternatively a new trial should be ordered.

Respectfully submitted,

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ROLL, SCHULLER & JAMES
Of Counsel

US COURT OF APPEALS: SECOND CIRCUIT

USA,
Appellee,

against

POLITI, etal
Appellants.

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 1st day of October 1974 at Foley Square, New York

deponent served the annexed Reply Brief upon

Paul J. Curran

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele

Print name beneath signature

Sworn to before me, this 1st day of October 1974

JAMES STEELE